IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.....

GEORGE R. COOKE COMPANY,
Petitioner,
vs.
NICK MAKI,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINIONS BELOW

The District Court filed no Opinion. The Opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 633 and also appears in the Transcript of Record filed with the Petition, commencing on page 20 thereof.

GROUNDS OF JURISDICTION

The Judgment of the Circuit Court of Appeals to be reviewed was entered on January 9, 1942 (R. 19), that court's Opinion being filed the same day (R. 20). Petition for Rehearing was filed February 6, 1942 (R. 25) and denied February 12, 1942 (R. 37).

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347(a).

It is believed that the following cases sustain the jurisdiction of this court:

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477;
Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

CONCISE STATEMENT OF CASE

With the exception of one matter, we believe that all the facts of the case necessary to the determination are set forth in the petition under the heading "Summary Statement of Matter Involved" and in the interest of brevity will not be repeated. The only question which might cause confusion is the fact that the matter arose in the District Court on petitioner's Motion to Dismiss the Amended Complaint and petitioner's Objections to respondent's Motion to File an Amended Amended Complaint. The Amended Complaint and the Amended Amended Complaint were identical except that the Amended Complaint did not allege when the claimed pneumoconiosis and tuberculosis developed. Upon the filing of the Amended Complaint, petitioner moved to dismiss the same. Prior to the determination of this Motion respondent moved for

leave to file an Amended Amended Complaint, to the filing of which petitioner objected on the same grounds upon which its Motion to Dismiss the Amended Complaint were based. Both were heard together and the court treated the objections as a motion to dismiss the tendered Amended Amended Complaint. The District Court's Order of February 22, 1940 granted the Motion to File the Amended Amended Complaint and dismissed the case (R. 3).

ERRORS RELIED UPON

It is respectfully urged that the Circuit Court of Appeals erred—

(1) in holding that the Minnesota ventilation statute relied upon created a new cause of action unknown to the common law and in holding that the Minnesota limitation statute involved was one going to the right and not merely to the remedy and had extra territorial effect;

(2) in failing to give effect to the Michigan Statute of Limitations;

(3) in reversing the Order of the District Court dismissing the case;

(4) in not holding, that in any event, any claim based on common law negligence was barred and, in not sustaining the dismissal of the case in so far as such claims were involved.

ARGUMENT

Summary of Argument

Point I. In the absence of a controlling Federal statute, a Federal District Court should apply the law of the state where such court is sitting in so far as limitations of actions are concerned.

Point II. The Minnesota statute of limitations relied upon by the respondent is a general statute of limitations and not a special statute dealing with the existence of a cause of action and the decision of the Circuit Court of Appeals to the contrary is in conflict with the applicable local decisions of the Supreme Court of Minnesota and the Supreme Court of Michigan.

Point III. Even if the Minnesota Statute of Limitations relied upon by the respondent were such a special statute affecting substantive rights as held by the Circuit Court of Appeals, still suit could not be brought in Michigan after the expiration of the time provided for in the applicable section of the general Michigan Statute of Limitations and the holding of the Circuit Court of Appeals to the contrary is in conflict with the applicable decisions of the Supreme Court of the State of Michigan.

Point IV. The decision of the Circuit Court of Appeals in this case in respect to the applicability of the Michigan Limitations Statute is in conflict with the decision of other Circuit Courts of Appeal.

POINT I

In the absence of a controlling Federal statute, a Federal District Court should apply the law of the state where such court is sitting in so far as limitations of actions are concerned.

It is a well recognized principle that the courts of the United States, in the absence of legislation on the subject by Congress, will regard and enforce the statutes of limitations of the state in which the District Court is sitting in the exercise of their jurisdiction over causes of action at law.

> *Griffin v. McCoach*, 313 U. S. 498, 85 L. Ed. 1481;
> *Campbell v. Haverhill,* 155 U. S. 610, 39 L. Ed. 280.

The enforcement of these statutes of limitations is required by the provisions of 28 U. S. C. 725, which provides:

> "The laws of the several States except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rule of decision in trials at common law, in the courts of the United States, in cases where they apply."

POINT II

The Minnesota Statute of Limitations relied upon by the respondent is a general statute of limitations and not a special statute dealing with the existence of a cause of action and the decision of the Circuit Court of Appeals to the contrary is in conflict with the applicable local decisions of the Supreme Court of Minnesota and the Supreme Court of Michigan.

The limitation provision upon which respondent relied and which the Circuit Court of Appeals held was not merely a remedial statute, but part of the substantive law of the State of Minnesota, is Section 9191 of the Minnesota statutes. This section covers eight different classes of cases in which actions shall be commenced within six (6) years, and provides, in part, as follows:

> "9191—Various Cases, Six Years. The following actions shall be commenced within six years:
>
> 1. Upon a contract or other obligation, expressed or implied, as to which no other limitation is expressly prescribed;
>
> 2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture.
> • • •"

The section then goes on in six additional sub-sections to enumerate other situations in which actions must be brought within six (6) years. It is clear that the interpretation given to the Minnesota statute by the Circuit Court of Appeals in the instant case is contrary to the applicable Minnesota decisions.

In the case of *Kozisek v. Brigham*, 169 Minn. 57, 210 N. W. 622, the Supreme Court of Minnesota, in discussing the effect of this section, said: "Statutes of limitation have to do, not with the obligation, but the remedy. • • •."

In the case of *In Re Daniel's Estate,* 208 Minn. 420, 294 N. W. 465, the Supreme Court of Minnesota had before it the contention that a provision of a general Iowa statute of limitations so conditioned rights created under another Iowa statute that the Iowa statute of limitations should be considered as a part of the newly created right and give effect in Minnesota. In holding that the Iowa statute was a general statute of limitations and hence did not condition rights, but simply prescribed the time within which rights may be enforced, the Minnesota court said:

> "There remains for consideration whether the two-year limitation of the Iowa statute goes to the right or the remedy. That the limitation refers to the remedy only is apparent for two reasons. First, the statute is a general statute of limitation. It does not in terms apply to actions to recover damages for death caused by tort under the survival statute. It covers all actions 'founded on injuries to the person or reputation' whether based on contract or tort, and applies to a death action which survives only because such an action is included in the term an action founded on injuries to the person based on tort. By its terms the statute applies to other actions. The survival section is found in the chapter relating to forms of action and the limitation in the chapter on the limitations of actions. It is clear that the legislature of Iowa treated the section as a general statute of limitation and not as one specifically conditioning rights under the survival statute. A general statute of limitations does not condition rights. It simply prescribes the time within which rights may be enforced. Hence it relates to the remedy only. *Louisville & N. R. Co. v. Burkhart,* 154 Ky. 92, 157 S. W. 18, 46 L. R. A., N. S., 687, and note; *17 R. C. L.,* pp. 952, 953, §318, note 4; *Restatement Conflict of Laws,* §605, comment a."

In the situation at bar the Minnesota statute relied on does not specifically refer to violation of the ventilation

statute, but covers such a cause of action, if at all, only because such cause of action falls within the general language, "upon liability created by statute." By its terms it applies to other actions. It is found in a separate chapter dealing with procedural and remedial matters. Under the tests set down by the Minnesota court, it is clear that it is a "general statute of limitations," and, as stated by the Minnesoa court, "a general statute of limitations does not condition rights."

It is equally clear that the Supreme Court of Michigan would not have considered the Minnesota statute relied upon as a substantive statute. In discussing the difference between general remedial statutes of limitations and limitations conditioning a newly created right, the Supreme Court of Michigan, in the case of *Bement v. Railway Co.*, 194 Mich. 64, distinguished between the situation where the limiting provision was a part of the statute creating the new right and the situation here presented where the general statute of limitations merely limited the time within which rights of action existing at common law or under other statutes might be brought, and said, at page 68:

> "A positive distinction seems to be made between cases in which the limitation of time for bringing suit is contained in the statute which creates the liability and right of action and general statutes of limitations of the rights of action existing under other statutes or under the common law. In the former the limitation of time is a limitation of the right, and, as has been said, the suit cannot be maintained if not brought within the time limited. In the latter the limitation of time for bringing suit is a limitation of the remedy only, and it has been held that under such general statutes of limitation the defendant may be estopped from the benefit of the statute by an agreement waiving it, or by concealment or by fraud. * * *"

From the foregoing it is clear that the decision of the Circuit Court of Appeals in the instant case is in conflict with the decisions of the Supreme Court of Minnesota and the Supreme Court of Michigan.

Not only is the holding of the Circuit Court of Appeals at variance with the applicable law of Minnesota and Michigan, but is in conflict with the law in the First Circuit and at variance with the weight of authority upon this subject, as indicated in the cases of *Dexter v. Edmands,* 89 F. 467 (C. C., D. Mass. 1898), and *Pulsifer v. Greene,* 96 Me. 438, 52 Atla. 921 (1902), in each of which cases the court considered the effect of general statutes of limitation controling the time within which a "liability created by statute" might be enforced.

POINT III

Even if the Minnesota Statute of Limitations relied upon by the respondent were such a special statute affecting substantive rights as held by the Circuit Court of Appeals, still suit could not be brought in Michigan after the expiration of the time provided for in the applicable section of the general Michigan Statute of Limitations and the holding of the Circuit Court of Appeals to the contrary is in conflict with the applicable decisions of the Supreme Court of the State of Michigan.

Petitioner, in the District Court, relied upon the general Michigan Statute of Limitations (Compiled Laws of Michigan, 1929, Section 13976) which provided, in part, that actions to recover damages for injuries to person shall be brought within three years from the time the said action accrues and not afterwards.

The Circuit Court of Appeals refused to give effect to this statute, holding that under the circumstances the Minnesota statute of limitations controlled.

The Circuit Court of Appeals, while recognizing the doctrine that in diversity of citizenship cases the rules of Conflict of Laws which govern are the rules of the state in which the Federal court sits, felt that there were no opinions of the Michigan court which erected sign posts to an appropriate decision of the instant case.

While we have been unable to find any decision of the Supreme Court of Michigan specifically involving the situation where it was sought to enforce in Michigan a foreign statutory cause of action within the time specified by the foreign statute, but after the time specified by the applicable Michigan statute, the Michigan statute clearly provides and the decisions of the Supreme Court of Michigan clearly indicate that maintenance of such an action in the Michigan court would not be permitted.

It is to be noted that the Michigan statute relied upon by the petitioner contains no exception as to foreign causes of action, either statutory or common law, and in the absence of an exception no exception may be read into the statute by judicial decision. This is clearly established by the case of *Buzzn v. Muncey Cartage Co.*, 248 Mich. 64, 226 N. W. 836, in which the court held that the general Michigan Statute of Limitations applied to statutory as well as other causes of action and said (p. 66):

> "• • • In creating this statutory right of action, the legislature must be presumed to have been mindful of the provision in the statute of limitations which requires that *all actions* shall be commenced within six years next after 'the causes of action accrue, and not afterwards.' Had the legislature intended to exempt this particular right of action from the limitations already provided by the statute, it could and doubtless would have so provided in plain terms. This statutory right of action had its origin in the contractual relations of the em-

ployer and employee; and the time within which it must be enforced is governed by the statute above quoted. * * *"

To the same effect is the case of *Ten Eyck v. Wing,* 1 Mich. 40.

It is apparent from the decisions of the Supreme Court of Michigan that that court has always looked with favor upon statutes of limitation and has considered them as remedial in their nature and as designed to set at rest stale claims as to which, by reason of lapse of time, evidence might well have been lost. Thus, in the case of *Gorman v. Circuit Judge,* 27 Mich. 138, the court said:

> "* * * Statutes of limitations are now quite generally looked upon as statutes of repose, and just as essential to the general welfare and the wholesome administration of justice as statutes upon any other subject, and to be construed with the same favor to effect the legislative intent."

In the case of *Shadock v. The Alpine Plank-Road Co.,* 79 Mich. 7, the court in discussing the underlying theory of statutes of limitations said (p. 13):

> "* * * The whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting the precise facts."

This reason is as applicable to newly created statutory causes of action as it is to common law actions and if it is the policy of the forum to not open its courts to litigation in certain types of cases after the lapse of a certain period of time, no legislature of a foreign state should be in a position to force it to do so.

The general rule relative to remedial statutes of limitations is correctly stated in §603 of the Re-statement of Law, Conflicts of Laws, as follows:

> "If action is barred by the statute of limitation of the forum, no action can be maintained, although the action is not barred in the state where the cause of action arose."

There is nothing in the decisions of the Michigan Court to indicate that the general law as so stated relative to the effect of such statutes of limitations is not the law of Michigan.

On the contrary, such Michigan cases as we have been able to find bearing in any manner upon this matter indicate that Michigan remedial statutes of limitations apply to the right to maintain suit in its court regardless of where or how the cause of action accrued. Thus, in the case of *Home Life Co. v. Elwell,* 111 Mich. 689, 70 N. W. 334, the Supreme Court said (p. 691):

> "It is a uniform rule that the law of the forum applies, and therefore it is the statute of limitations in force in Michigan, and not that of New Jersey which must govern. See *1 Wood, Lim.* §8; *Howard v. Coon,* 93 Mich. 442."

In the case of *Blackburn v. Blackburn,* 124 Mich. 190, 82 N. W. 835, the court said:

> "If it were to be admitted that these notes were barred by the statute of limitations of North Carolina, it would constitute no bar to an action in this State. As was said by Kent, C. J., in *Ruggles v. Keeler,* 3 Johns. 267 (3 Am. Dec. 482):
>
> "'A foreign statute of limitations can no more be pleaded to a suit instituted here *than it can be replied to a plea under our statute.* Statutes of limitations are municipal regulations founded on local policy, which have no coercive authority abroad, and with which foreign or independent governments have no concern." (Italics ours.)

We have already referred to the case of *Bement v. Railway Co.*, 194 Mich. 64. From this case it is clear that the Supreme Court of Michigan would not have construed the Minnesota statute of limitations as permitting the maintenance of an action in Michigan after the time set forth in the Michigan statute had expired.

POINT IV

The decision of the Circuit Court of Appeals in this case in respect to the applicability of the Michigan Limitations Statute is in conflict with the decision of other Circuit Courts of Appeal.

In the case of *Hutchings v. Lamson*, 96 F. 720 (C. C. A. 7 C), that Circuit Court of Appeals said (p. 721):

> "The contention of the plaintiff in error that the Kansas statute of limitations alone can have any application to the case is manifestly not tenable. The general rule is that in respect to the limitation of actions the law of the forum governs, and while the courts will enforce a limitation established under the law of another state, when applicable, it does not do so to the exclusion of the law of the forum. It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred. The cases cited show that the law of Kansas, if applicable, will be enforced in Illinois, but they do not say nor imply that a like or different limitation by the statute of Illinois may not apply. • • •"

The decision of the Circuit Court of Appeals is also in conflict with the decision of the Second Circuit in the case of *Platt v. Wilmot*, 118 Fed. 1019, affirmed, 193 U. S. 602. This Court, in its opinion, at page 610, said:

> "It is not the case of a state legislature assuming to regulate foreign corporations, and no such attempt has been made. The substance of the legislation is that when suits are brought in the State of New York to enforce therein the liabilities of directors or stockholders, the statute of limitation enacted by the legislature of that State in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign crporations. This is what the legislature has done and this is what it had the right to do.
>
> "The Federal courts, sitting in the State, will, in cases brought therein, enforce the state statute of limitations in actions of this nature."

That the decisions of the Second Circuit Court go to the extent of applying the general statute of limitations of the forum, even though shorter than that of the state creating the right, is clearly indicated by the decision of the District Court in the case of *Continental Illinois National Bank & Trust Co. v. Best,* 20 Fed. supp. 80 (D. C. S. D. N. Y. 1937).

Not only is the holding of the Circuit Court of Appeals in this respect contrary to the applicable Michigan decisions, and those of the Second and Seventh Circuits, but is contrary to the overwhelming weight of authority upon this problem.

The Circuit Court of Appeals was apparently of the opinion that there were two lines of authority and that in view of the absence of Michigan authority upon the point it was entitled to adopt that line of authority which it approved. In this connection the Opinion of the Circuit Court of Appeals is as follows (R. 22):

> "Had the same statute of Minnesota not only created the right, but also barred the remedy within a fixed period, there would be firm, though not unchallenged, authority for appellant's position.

Theroux v. Northern Pacific Railway Co., 64 Fed. 84 (C. C. A. 8); *Brunswick Terminal Co. v. National Bank of Baltimore*, 99 Fed. 635 (C. C. A. 4); *Keep v. National Tube Co.*, 154 Fed. 121; *Negaubauer v. Great Northern R. R. Co.*, 92 Minn. 184, 99 N. W. 620;

"Compare *Engel v. Davenport*, 271 U. S. 33;

"Observe *obiter dicta* in *L. & N. R. R. v. Burkhart*, 154 Ky. 92, 98;

"*Contra: Tieffenbrun v. Flannery*, 198 N. C. 397, 151 S. E. 857; *White v. Govatos*, 1 Terry Del. 349, 10 Atlantic (2d) 524; *Minor, Conflict of Laws*, Sec. 10.

"We approve the doctrine of *Theroux v. Great Northern Railway Co., supra.* • • •"

It is respectfully submitted that the cases cited do not support the Circuit Court of Appeals. In neither the *Theroux* case nor the *Negaubauer* case was there an applicable general statute of limitations—a procedural statute of the forum—specifying a shorter time. That such is the proper construction of these cases is shown by the Opinion of the Minnesota Court in the case of *In re Daniel's Estate*, 208 Minn. 420, 294 N. W. 465.

The case of *Keep v. National Tube Co.*, 154 Fed. 121, presents the identical situation to that in the *Theroux* and *Negaubauer* cases. The statute of the forum there relied upon was a part of the New Jersey Death Act and the court held that it applied only to actions for death arising in New Jersey and consequently there was no shorter applicable remedial statute in the forum. The Opinion of the Court in the *Keep* case clearly indicates that had there been involved in that case an applicable general limitations statute of the forum, such limitations statute, if shorter than the foreign "conditioning statute" would have control. The Court in the *Keep* case says, in part, at page 124:

> "* * * One who acquires such a right under the New Jersey statute, or under the Minnesota statute, may carry it with him into any jurisdiction where a substantially similar right has been created. Why should the time within which such a right may be enforced be curtailed in a jurisdiction different from that in which the right was created by any statute *other than one which, like a general statute of limitations, operates on the remedy only?*" (Italics ours.)

The language of the Opinion in the case of *Brunswick Terminal Company v. National Bank* no doubt supports the opinion of this Court but it is submitted that this language is based upon a misconception of the *Theroux* case and the case of *Davis v. Mills,* 194 U. S. 451, 48 L. Ed. 1067, a misconception which we most respectfully urge is continued in the opinion of the Circuit Court of Appeals. Further, on its facts, the *Brunswick* case does not present the situation at bar. In the *Brunswick* case the action was one in equity and the statute of the forum relied upon was one applicable, to quote the opinion of the Court in that case, "to actions of assumpsit or action of debt on simple contract * * *."

The decision of the Circuit Court of Appeals in this case is not an application of the doctrine of *Theroux v. Northern Pacific Railway Co., supra,* but is an unjustified extension thereof. That it was an extension of the doctrine of the *Theroux* case is recognized by the Circuit Court of Appeals itself in an opinion filed the same day as the opinion in the instant case. In the case of *Wilson v. Massengill,* 124 F. (2d) 666, the Sixth Circuit Court of Appeals said, at page 669:

> "In a case decided today, *Nick Maki v. George R. Cooke Company,* 6 Cir., 124 F. (2d) 663, this Court approved, applied *and extended* the doctrine of *Theroux v. Northern Pacific R. Co.,* 8 Cir., 64 F. 84, * *." (Italics ours.)

CONCLUSION

It is respectfully submitted that the holding of the Circuit Court of Appeals in this case is contrary to the applicable local decisions of Minnesota and Michigan. Even if it be contended that the Michigan and Minnesota decisions hereinabove referred to are not controlling, the decision of the Circuit Court of Appeals is based upon principles contrary to the great weight of authority and constitutes an admitted extension of the doctrine of *Theroux v. Northern Pacific Railway Co.*, upon which the Circuit Court of Appeals purported to rely. In view of the important matter of conflicts of laws involved in this case, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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